No. 4949.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Luigi Sagliuzzo, et al.,
Libellants and Appellants,

vs.

Gasoline Launch "I. S. E. #2,"
Respondent,

J. E. Frymier,
Respondent and Claimant.

CLAIMANT AND RESPONDENT'S BRIEF ON APPEAL.

Wilbur Bassett,
Proctor for Claimant and Respondent.

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CLAIMANT AND RESPONDENT'S BRIEF ON APPEAL.

An order was entered herein August 2, 1926, granting us leave to renew our motion to dismiss heretofore filed herein and denied without prejudice. Upon this leave, we respectfully renew the motion without refiling.

This motion is based upon failure of appellant to file apostles within thirty days of notice of appeal, and the pertinent facts are set out in our motion as follows:

(1) Notice of appeal was filed June 21, 1926, as shown by original certificate on file herein.

(2) More than thirty days thereafter, to-wit, July 24, 1926, an order granting thirty days' additional time was

granted by Honorable William P. James, district judge, the cause having been heard before Honorable Paul J. McCormick, another judge of said court. This order was made *ex parte;* was never filed in the district court; no notice was ever given to respondent.

(3) Notice of motion to dismiss, supported by affidavits and certificate, was presented August 2, 1926, and denied without prejudice, with permission to renew.

We respectfully suggest that, in law and equity cases, the only judge of the lower court competent to extend time is "the justice or judge who signed the citation." (Rule 16.) In the absence of citation, such power would doubtless be limited to the judge who tried the case. In an admiralty appeal, however, there is no authority for the trial court to extend any time, the rule in admiralty being (12): "Time specified in the foregoing rules for any proceeding may be extended by order of the judge of this court." We submit that Judge James had no authority, even in a law case in a cause which had not been tried in his court; that his order was a nullity under the rules in admiralty of this court, and that no consideration of leniency or comity should in any event permit an extension after the time for an act has expired.

We move the court for an order dismissing the appeal on the ground set out in our written motion.

The Errors Alleged Are Not Properly Assigned.

Without waiving our motion to dismiss, we submit that the points urged by appellants are not assigned error.

These points are based upon the first and second assignments of error only, to-wit: That the court erred in

sustaining exceptions (1) to the original libel, and (2) to the amended libel. The respondents have waived assignment 3, that the court erred in dismissing the libel herein, and now say that the libellants "declined to amend." (Appellant's brief, p. 1.) If they declined to amend, they cannot complain of the entry of default and judgment thereon.

We have left, then, only two assignments of error.

The First Assignment That the Court Erred in Sustaining Exceptions to the Original Libel Cannot Be Heard.

It is an elementary rule of pleading that, where a party amends a pleading after a ruling thereon, he acquiesces in the ruling and it cannot be assigned as error.

City of Plankinton v. Gray, 11 C. C. A. 268, 63 Fed. 416.

Northern Pacific v. Murray, 9 C. C. A., 87 Fed. 648:

> "The objection was waived by the defendant in error by his election to amend his complaint and proceed as he has done. It was open to him to have stood upon his right in ejectment or to adopt the course he has taken. He was at liberty to take one of two roads, but not both, nor can he at the same time accept and reject the judgment under review."

Brittain v. Oakland Bank of Savings, 112 Cal. 2:

> "The amended complaint which was filed after the demurrer to the original complaint had been sustained superseded the original complaint, and the error, if any, committed in sustaining the demurrer was thereby waived."

Another cogent reason why the assignment of error is not available is that the record shows no exception reserved by libellant. (Apostles, p. 12.)

Harvey v. Tyler, 69 U. S. 328:

> "However it might pain us to see injustice perpetrated by a judgment which we are precluded from reviewing by the absence of proper exceptions to the actions of the court below, justice itself and fairness to the court which makes the rulings complained of require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception."

German Alliance Insurance Company v. Hale, 219 U. S. 307. In this case plaintiff demurred to the plea:

> "The demurrer was sustained, but no exception appears to have been taken to this action of the court. The defendant did not stand upon his plea and went to trial upon the merits of the case without objection * * * under these circumstances we are not required to consider the questions raised by that plea."

The Assignment of Error That the Court Erred in Sustaining Exceptions to the Amended Libel Is Not Available.

Here again we have an order sustaining exceptions made in open court in the presence of the respective proctors and an order granting leave to libellants to amend in ten days. We are told in appellants' opening brief that they declined to amend, but they must be taken to have asked leave to amend, as such leave is not a

matter of right, and was granted in open court in their presence, and for their relief. They did not except to the action of the court in sustaining the plea to their amended libel, but acquiesced in it and asked and procured leave to file a second amendment. (Apostles, p. 22.) This was an election to accept the ruling of the court upon the exceptions and they cannot now be heard to assert that such ruling was error. In addition to the cases upon that point which we have already referred to in connection with the first exception, we invite the court's attention to

Berry v. Barton, 12 Okla. 221, 66 L. R. A. 513:

> "It is not necessary to decide in this case as to whether the second count in the answer stated a defense, for the reason that when the demurrer was sustained the defendants were granted leave to amend, and by taking leave to amend they waived the error, if any, in the sustaining of the demurrer. In order to take advantage of the ruling on a demurrer when it is sustained, the party must stand upon his pleading held to be defective, and not amend. * * * The rule not only applies where the party actually pleads over, but also where he takes leave to plead over after a demurrer has been sustained to his pleading. It is the intention of the party, as indicated by his acts at the time, which fixes his standing in court. By taking leave to amend, he thereby indicates his intention to abandon his former position and to draft his pleading upon a different theory, or to state his cause of action in different language. By taking leave to amend, he admits the insufficiency of the pleading, and he is bound by his own conduct, and cannot afterwards take advantage of it. Any other rule would permit

> delays under the guise of a desire to submit to the ruling of the court and amend, when in fact the party had no intention of amending. Courts everywhere insist upon such rules of practice and conduct of parties litigant as will promote justice, and such as will not encourage or countenance deception. The attorney is supposed to know the law of his case equally as well as the court, and inasmuch as the statute, with the permission of the court, allows a party, at his own election, to amend or stand on his pleading, it is only fair that he should make his election, and then be bound by it; and, if he elect to amend, he cannot afterwards, simply because his own views of the law may have changed, or further investigation convinced him that his former position was correct, urge error in a ruling which he had accepted as the law. When he elects to amend he abandons, not necessarily his view of the law as urged against the demurrer, but that particular pleading, and it is just the same as though it had never been filed; and a party who expressly abandons a pleading cannot at his own election, without permission of the court, urge it as an existing pleading in the case. These views are supported by the authorities."

We submit that if the orderly procedure in a law case makes such a rule desirable, the summary practice in admiralty makes it imperative.

Another reason why the assignment is not available is that the record exhibits no exception taken to the court's ruling. Without such exception there is no error.

Gonzales v. Buist, 224 U. S. 126.

A third reason why there is no error here for Your Honors to consider is that the trial court made a finding

of fact that libellants had deserted their cause and were in contumacy and default. (Apostles, p. 22.) Appellants make no point in this court against this finding, and we submit that it is, therefore, immaterial how good or how bad their cause was in the court below. If that court found that they abandoned the cause, they cannot renew an abandoned cause for a trial *de novo* in this court. They made no effort to remove the stigma of contumacy in the court below, nor any application for relief from the default decree. A litigant in admiralty may not choose his forum at will, but must show his best case in the trial court. The admiralty rules of the United States Supreme Court clearly have this rule in view when they provide (Rule 38): "If in any admiralty suit the libellant shall not appear and prosecute his suit and comply with the orders of the court, he shall be deemed in default and contumacy, and the court may, on the application of the respondent or claimant, pronounce the suit to be deserted and the same may be dismissed with costs."

We respectfully submit that the appeal herein should be dismissed or decree entered for respondent for the following reasons:

(1) The order of the trial court sustaining claimant's exceptions was acquiesced in by libellants' application for leave to amend.

(2) The errors assigned are not available because no exceptions were taken to the rulings complained of.

(3) The trial court having found that libellants deserted their cause and were in default, it is immaterial

what merit their cause might have had or what error was made as to prior rulings.

(4) Libellants admit in their opening brief that the amended libel was uncertain and cannot, therefore, assert error in sustaining exceptions thereto. (Brief, p. 11): "The amended libel becomes somewhat uncertain because of the libellants' attempt in their amended libel to overcome some of the objections made to the original libel."

(5) No error is sufficiently assigned.

The Blakely, 285 Fed. 348:

> "The error assigned was: 'The court erred in entering a decree sustaining the libel.' This is not an assignment of error. It is rather an allegation of error. It merely declares that the court erred, leaving as a subject matter for review whatever the appellant later may determine upon. * * * When it lacks the requisite specification, it is in legal effect not an assignment of error at all and the court will not consider it."

Exceptions to the Amended Libel Were Properly Sustained.

Without waiving any of the considerations heretofore set out, which we think are determinative of this appeal, we will briefly indicate our position in support of the exceptions to the amended libel.

The first exception (Ap., p. 18) points to the lack of allegation of fishing license. The allegation is "that each of said libellants have been duly and regularly licensed as fishermen by the Fish and Game Commission of the state of California * * * and are duly and

regularly licensed * * * as seamen and seamen fishermen." This is uncertain in that it does not appear that any license, as required by R. S. U. S. 4321 and Cal. Stats. 1917, Act 1690, was in force during January, 1926, when the fish were caught and marketed.

Exception II goes to uncertainty as to the terms of the contract alleged to have been made by the owner with Mascola, the Master. This is not alleged to have been in writing, and we are entitled to have all of the alleged terms upon which libellants rely set out in their libel.

Exception III points out that it does not appear whether the Master asserts a written or an oral contract made with the owner. If it was written we may demand a view before trial, but if oral, we must take the Master's deposition and that of the other libellants. This calls attention to another ground for not sustaining the libel, to-wit, that the addresses of the libellants are not set out, as specifically required by Rule 22 in admiralty. This rule the court will enforce whether exception is taken or not.

The Havre, 11 Fed. Cas. 6232.

Exception IV goes to the same defect in the allegation of the Master's contract with the crew.

Exception V points to the uncertainty as to whether the vaguely alleged contract between the Master and the crew was made on behalf of the ship or on the credit of the Master. It is clear that a presumption in that regard does not arise except in the absence of evidence, and the contract made clearly imports an intention to charge the Master only. (Ap., p. 15.)

Scott v. Failes, 21 Fed. Cas. 12530: Benedict, J., denied recovery *in rem* to a cook on a canal boat because he had made a special agreement with the Master and on his credit. It is elementary in admiralty that there is no lien upon a vessel unless given by express agreement, and if such agreement was made it must appear that the one making it was within his authority.

Exception VI points out that the allegation of the net proceeds is ambiguous unless libellant alleges what deductions from the gross proceeds are to be allowed. Brief of libellants makes no mention of this exception, so we assume that they considered it well taken, and we may add that if any exception is well taken, a specification of error that the court erred in sustaining exceptions must fall.

Exception VII points to the insufficiency of the allegation made on behalf of the Master, upon information and belief that he received $2,000.00. This is a matter presumably within his knowledge, which cannot be alleged upon information and belief, and the same rule applies to his attempt to allege upon information and belief that said sum, less expenses of operation, was $1500.00. The expenses of operation being within the scope of his knowledge and duties, he must allege them positively.

Exception VIII calls attention to the fact that no accounting has been had or was tendered. The admiralty gives recovery for wages only, which must be certain and not subject to an accounting. There is no action to recover upon a lay, nor is there any lien, until amounts due upon a lay are ascertained so that they can be said to be wages.

The Fairplay, 8 Fed. Cas. 4615:

> "The second section of the Act of June 19, 1813, which gives a remedy *in rem* to fishermen for their shares of a fishing voyage plainly imports that courts of admiralty are incompetent to afford that kind of relief without the authority of a positive statute. When the voyage is terminated and profits ascertained on an adjustment of the account, the proportion is wages and may be sued for and recovered as such in admiralty. A vessel cannot be seized and detained to ascertain upon the settling of accounts whether the seaman has a claim against her. There must be positive evidence that wages are due to justify that process. Libel dismissed."

Grant v. Poyllon, 61 U. S. 162: This was an action to recover balances on a contract of affreightment. It is admitted that the contract was maritime, but it appeared that an accounting was necessary. The court said:

> "Here is a complicated account to adjust, apportioning the loss between the members of a lumber company, exacting from them what may be necessary not only to pay the balance of freight due, but whatever may be required to discharge what might be due to the Master. * * * It is clear that the exercise of the powers indicated do not belong to a court of admiralty, but are appropriate to a court of chancery."

The libel was dismissed.

In cases such as The Domingo, 10 Fed. Cas. 605, the court is always careful to state that an account has been rendered before suit, or has been demanded and refused. We suggest that Pratt v. Thomas, 19 Fed. Cas. No.

11377, relied upon by appellant (brief, p. 9), has no bearing on this subject, as that was an action upon a contract for wages at $14.00 per month.

The rule that no action can be maintained until there has been an accounting applies also to actions *in personam*. Duryee v. Elkins, 8 Fed. Cas. 4179. These considerations, therefore, cover exceptions VIII, IX, and X.

Exception XI points out that there is nothing upon which to predicate liability *in personam* against Frymier, the claimant. On the face of the libel, he is not liable *ex contractu*, and there is no sufficient allegation to show that the Master's contract with the fishermen was on behalf of the vessel or its owner. We are not concerned with the question whether, if such allegation had been made, it would be supported by a presumption of authority.

Where it appears that the owner is not in possession or control, there can be no recovery *ex contractu*.

Giles v. Vigoreux, 58 Am. Decs. 704.

Exception XII points out that the Master cannot sue *in rem* for his wages. The M. Vandercook, 24 Fed. 472; The Grace Darling, 10 Fed. Cas. 5651. Moreover, it appears from the libel that there is nothing owing to Mascola. (Ap., p. 15.) "The Master of said vessel sold the said fish for the sum of $10.00 per ton, and received therefor $2,000.00." Our ingenious opponent suggests that that is unimportant, because Mascola does not appeal.

The Mary Ethel, 294 Fed. 525:

> "This respondent did not appeal, but as this is a new trial we may, under now thoroughly settled authority, make such disposition as we deem proper, whether or not one of the litigants has appealed."

The same considerations apply to exception XIII.

Exception XIV points out that the various libellants do not show any joint right and that they have not separately or specifically pleaded their separate rights. It is only by courtesy that these separate claimants are allowed to unite in one action, and in so doing the Supreme Court rule already alluded to provides that "if *in personam,* the names and places of residence of the parties insofar as known shall be set out, and that the libel shall also propound and allege in distinct articles the various allegations of facts upon which the libellant relies in support of his suit, so that the respondent or claimant may be able to answer distinctly and separately the several matters contained in each article."

Exception XV sets out "that said amended libel is not duly verified as to said separate claims." Your Honors have already passed upon this point in The Oregon, 133 Fed. 609, in which Judge Gilbert said: "We do not think this practice should be encouraged."

We pray that the court enter an order dismissing the appeal, or enter its final decree dismissing the libel, and award us our costs, and that, in accordance with Rule 30 of this court, the court specially direct the allowance to respondent of interest and damages.

Respectfully submitted,

WILBUR BASSETT,

Proctor for Claimant and Respondent.